United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7698

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC. and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs-Appellants,

-vs-

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the Controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants-Appellees.

APPEAL FROM THE FINAL DECISION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT CIVIL ACTION No. 1970-277.

BRIEF FOR DEFENDANTS-APPELLEES

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Docket No. 75-7698

GEORGE C. FREY READY-MIXED CONCRETE, INC., *et al.*,

Plaintiffs-Appellants,

vs.

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Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Introductory Statement

This action was commenced in June 1970. In January 1975, defendants moved for summary judgment under Rule 56 and for dismissal of the complaint under Rule 12 (A. 407). As a result of repeated requests by plaintiffs for additional time to answer the motion, and to file a much-promised but never submitted amended complaint (A. 477-8, 577-9, 604-5, 1285, 1300, 1313, 1328-9, 1362-4), and, as a result of the District Court's efforts on its own motion to obtain from plaintiffs factual and legal support for plaintiffs' position (A. 573, 604-5, 1285, 1328-9), the motion was not finally submitted to the Court for decision until August 19, 1975, eight months after the motion had been filed (A. 605).

To commence a legitimate antitrust action, the plaintiff should, of necessity, do substantial investigatory work in order to ascertain whether there have, in fact, been violations of the federal antitrust statutes, and, if so, whether and to what extent those claimed violations have resulted in damage to the plaintiff. A minimum condition precedent to the institution of an antitrust suit should be a factual determination by the plaintiff as to whether there is causal connection between the losses perceived and the violations claimed, or whether those losses are the consequence of other phenomena such as inefficiency of management, inefficiency of operation, general economic recession, the nature or economy of the industry involved, and so on. It is clear in a general jurisprudential sense, and specifically with respect to the filing of antitrust claims, that the processes of the Court should not be abused and perverted into a means of competitive harassment and into a device to obtain a general inquisition *in the hope* of finding some basis for boiler-plate claims of violation or in the hope of finding some basis for some kind of claim.

A Conspicuously Deficient Complaint

The plaintiffs had well in excess of five years to provide the Court and the defendants with a complaint setting forth claimed ultimate facts which, if proved without intervening defense, would entitle plaintiffs to relief under the antitrust statutes. That plaintiffs were absolutely unable to produce such a complaint establishes that the plaintiffs were possessed of no facts to support the antitrust and other reckless claims made when their action was commenced, and that plaintiffs were possessed of no such facts five years and three months later when the motions were submitted. Indeed, in the course of oral argument of defendants' motion to dismiss, plaintiffs'

counsel *conceded* the insufficiency of the complaint but took no action to correct that insufficiency (Proceedings of May 12, 1975; A. 1317).

As will be seen, plaintiffs' unseemly attempts to lay their own failures and inadequacies at the feet of the District Court are without factual or ethical support.

A Clear Case for Summary Judgment

The plaintiffs also had well in excess of five years to provide the District Court with factual information, if any existed, to avoid summary judgment. That they were unable to do so—even with respect to the specification of facts in support of their claims of damages and causation of damages—epitomizes the absence of any evidentiary support for the conclusory claims of violation. That plaintiffs had the obligation to provide such evidentiary support in order to avoid summary judgment is clear. Rule 56(e) provides in part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Plaintiffs have in substance stated to this Court that their failures in these respects were the result either of a conscious deprivation by the District Court of normal rights of disclosure under the Federal Rules, or such a deprivation caused by the District Court being "duped" for five years by clever counsel for the defendants into denying those rights.[1]

[1] *See* affidavit of plaintiffs' counsel, Arnold Weiss, dated June 24, 1976 on plaintiffs' motion to reinstate appeal, and plaintiffs' brief on appeal.

Beyond being baseless, these accusations are demonstrative of a paranoia pervading all of plaintiffs' rash assertions throughout the entire proceeding *(see, e.g.,* affidavit of Lois Muck, A. 499-522; and *see* A. 524). Wanton invective—wild claims of "double whammy" weapons, "vicious assaults", "buccaneering" attempts, "deceptive decoys" and the like—are no substitute for facts and responsible representations.

It is a transparent tactic to make outrageous demands for "disclosure" and then to claim "foul" when those demands are denied. And, it is an improper imposition on this Court for the plaintiffs—in their effort to persuade this Court that the District Court has acted improperly—to make repeated *false claims* that they were not even able to obtain rulings from the District Court on their proliferation of motions and cross-motions with respect to discovery.[2]

Nor can plaintiffs blame the District Court for their failure to file the promised but fictional amended complaint, for their failure to file an adequate complaint in the first instance, for their failure to pursue permitted discovery, for their failure to develop from sources other than defendants

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[2] A) On page 4 of plaintiffs' brief, plaintiffs state: "The District Court refused to hear plaintiff's appeal from the Magistrate's order (A. 291, 355, 356)." The contrary is true. In its order of November 20, 1974 (A. 352, at 355), the District Court specifically denied that "appeal." *See also* affidavit of Arnold Weiss, plaintiffs' counsel, June 24, 1976, on plaintiffs' motion to reinstate appeal where the District Court's order of November 20, 1974 is described *by that counsel* as: "Order Denying Plaintiffs' Appeal and Referring Discovery Questions to Magistrate."

B) On page 7 of plaintiffs' brief, plaintiffs state: "Plaintiffs moved to compel answers to these interrogatories but were never able to obtain a ruling from the Court." The contrary is true, as established by an order, prepared by plaintiffs themselves, and granted by the Court in which it is expressly stated that this motion was heard and decided (Order of May 7, 1971, A. 95, at 96).

any evidence or proof in support of shotgun accusations of antitrust, for their inability to substantiate factually any damages resulting from the claimed wrongs, or for their attempt to abuse the jurisdiction of the federal Courts by unsuccessfully attempting to clothe a nonfederal breach of contract claim in antitrust verbiage.[3]

Plaintiffs have not set forth *facts*—as distinguished from accusations—as required by Rule 56.

A Nonfederal Breach of Contract Suit

This is not a federal antitrust suit. It is an action for alleged breach of contract over which the federal Courts have no jurisdiction. That fact is established by the complaint itself, by the admission of plaintiff, Herbert Frey, that "it is because of this contract [the 1949 Agreement] that we [plaintiffs] are in here" (R. 94, p. 72, lines 7-8; pp. 66-73), and confirmed by the Note of Issue filed by the plaintiffs in which the *plaintiffs* described the nature and object of action *not* as an antitrust action, but as an action for: "Breach of contract, Rescision, Breach of Condition" (A. 209). What the plaintiffs sought to achieve in the action was enforced performance by the defen-

[3] On argument of defendants' motion for dismissal on May 12, 1975, the District Court asked plaintiffs' counsel for the much-promised amended complaint (A. 1285 lines 4-8). The Court further admonished plaintiffs' counsel that a proposed amended complaint would be necessary to consideration of a motion to amend (A. 1313, lines 5-15; A. 1328, line 13—1329, line 11). Having received no answering brief, affidavits or proposed amended complaint from plaintiffs, the District Court on its own motion filed an order on August 4, 1975—some three months after oral argument and eight months after the motion was filed—indicating that the Court was strongly persuaded by defendants' arguments and authorities and again inviting plaintiffs to file, by August 18, 1975, answering papers and the proposed amended complaint. Plaintiffs filed papers on August 19, 1975 but did not file any proposed amended complaint (A. 605).

dant Pine Hill Concrete Mix Corp. (Pine Hill) of a 1949 contract which had expired but which plaintiffs sought to have enforced in order to require Pine Hill to continue making deliveries of gravel and concrete sand to plaintiffs at discriminatory discount prices 20% below those charged by Pine Hill to all of its other customers. When the plaintiffs succeeded during the pendency of the action in obtaining an order of the District Court requiring such discount price deliveries, there developed a marked apathy and lassitude in plaintiffs' prosecution of the action.

Statement of Facts

General Background

Plaintiffs George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plant, Inc. were corporations organized and owned by George C. Frey and engaged, among other things, in the business of producing and selling ready-mixed concrete (concrete) in the Western New York area (A. 625; R. 98, pp. 4, 9).[4] George C. Frey was the father of Herbert Frey and Lois Muck, whose immediate families have owned 50% each of the stock of these companies since the death of George C. Frey in September 1970 (A. 8, 790; R. 98, p. 4). Except for the period 1954-1956 when George C. Frey was in jail, he ran the business on a day-to-day basis, and he continued to make the fundamental decisions while in jail (R. 90, pp. 13-5; R. 94, p. 51).

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[4] In 1972, these two corporations were apparently merged, the surviving corporation being named Frey Concrete, Inc. Frey Sand & Gravel, Inc. continues as a separate corporate entity, also owned by the Frey and Muck families. In this brief, the plaintiff corporations engaged in the ready mix concrete business will be collectively referred to as "Frey".

During all of his business life until his death in 1970, George C. Frey had interests in gravel and sand lands in the Erie County area, and he bought and sold such properties (A. 746-7, 755, 997; R. 92, pp. 351-83). In 1949, he owned some 100 acres of gravel lands and a gravel and sand plant adjacent to Pavement Road in Lancaster, New York (A. 12-3). On May 17, 1949, he elected to sell those premises and plant to Pfohl Brothers, Inc. pursuant to an Agreement under which Pfohl Brothers, Inc. agreed to supply Frey's demands for concrete sand and gravel at the concrete plant on Pavement Road, which was leased back to Frey (A. 148-58; 149-54). Frey was not obligated to purchase any minimum quantities in any given year or in any given period of time, but was obligated to purchase all requirements of Frey's Pavement Road concrete plant. Frey was to be charged Pfohl's "prevailing pit prices" at its Peppermint Road gravel plant for sand and gravel, less a 20% special discount and an additional 2% monthly payment discount (A. 156).

The term of the Agreement was for 15 years from June 1, 1949 until June 1, 1964, with Frey having the option to renew *the lease* of the gravel plant for an unspecified additional period (A. 463). No provision was made for renewal of the requirements contract.

The Agreement further provided that the prices for sand and gravel could be changed on an annual basis by either party giving notice to the other at least 60 days before any April 1 during the term, in order to "conform with prevailing pit prices" (A. 156).

Frey and Pfohl Brothers, Inc. entered into performance of that Agreement. Frey received deliveries of sand and gravel from the Peppermint Road gravel property and plant to Frey's Pavement Road concrete plant at the discriminatory

discount prices of 20% below prices charged by Pfohl Brothers, Inc. to all of its other customers (A. 111). During the succeeding 10 years, Pfohl Brothers, Inc.'s prevailing pit prices at the Peppermint Road gravel plant changed on occasion, and, as a consequence, the prices which Pfohl Brothers, Inc. charged to Frey for sand and gravel changed accordingly, less the 20% special discount (R. 95, p. 55).

In 1957, George C. Frey obtained control over 500 acres of gravel properties in Alexander, New York, approximately 24 miles from the Frey Pavement Road concrete plant and a distance of 38 miles from a concrete plant owned and operated by Frey on Union Road in West Seneca, New York (A. 527, 625, 749; A. 639). Both concrete plants were used to produce ready-mixed concrete for the Western New York area (A. 675-7, 712, 999, 1104-7, 1175). George C. Frey incorporated Frey Sand & Gravel, Inc. for operation of the very substantial Alexander sand and gravel resources (A. 625; A. 683). Over the years since 1957, Frey has obtained substantial quantities of sand and gravel for its Union Road plant (up to 25% of the Alexander production) and has also obtained some such materials for its Pavement Road concrete plant from the Alexander resources and plant (A. 677, 701, 707, 960, 972; R. 96, p. 82). In addition, Frey has made purchases for both its Union Road and its Pavement Road concrete plants from other suppliers of sand and gravel in the area (A. 675, 679, 703, 773-6, 781, 972-3, 1065-6, 1127-8; R. 92, p. 330-1; R. 96, pp. 81-2. Frey never purchased any aggregate (that is, sand, grit or gravel) from the Pfohl Brothers, Inc. Peppermint Road property or gravel plant for use in Frey's Union Road concrete plant (R. 90, p. 161).

In 1957, Pine Hill purchased all of the capital stock of Pfohl Brothers, Inc. and thereafter, through a wholly owned subsidiary, Regent Sand & Gravel Corp. (Regent), owned and

operated the Peppermint Road gravel plant (A. 148-58; A. 465-7; A. 188; A. 1202-3). Pine Hill continued to sell to Frey under the 1949 Agreement (A. 697). In 1958, Pine Hill increased the Peppermint Road gravel plant pit prices to all customers supplied by it from that plant, and, accordingly, the Frey prices were similarly increased, subject to the 20% special discount. Frey accepted those increases and continued to obtain sand, grit and gravel for its Pavement Road concrete plant from Pine Hill (R. 90, pp. 135-6; R. 95, pp. 55-7). None of the plaintiffs ever made any objection to the Pine Hill acquisition of the Pfohl Brothers, Inc. capital stock, to the operation by Pine Hill of the Peppermint Road gravel plant, or to the 1958 increases in prevailing pit prices with consequent increases in prices (less the 20% special discount) to Frey (A. 1010; R. 90, pp. 134-6, 142).

Over the decade following 1957, Pine Hill continued to supply Frey at the 1958 prices, with the 20% special discount (A. 690). During that period, plaintiffs had ownership and other interests in gravel and sand properties in Erie County, and had opportunities to purchase properties which plaintiffs elected not to pursue (A. 643, 651-3, 668, 746-7, 754-5, 994-5, 997; R. 92, pp. 351-83). Pine Hill and Frey were in active competition with each other—and with numerous other companies in the Western New York area—in the ready-mixed concrete business (A. 733, 736, 860-3, 903, 1105, 1107; A. 63, 184; A. 544-5).

In 1968, as a consequence of inflated costs over the previous 10-year period, Pine Hill found it necessary to increase its pit prices for sand, grit and gravel, and so notified Frey (R. 95, pp. 41, 57-60). The January 31, 1968 Pine Hill notice and revised price list was sent to Frey on February 6, 1968 (A. 164u-v). Frey thereafter purchased aggregates from Pine Hill for its Pavement Road concrete plant but, after receipt of

those deliveries, Frey refused to pay the new prices charged, that is, prices based upon the new list prices as charged by Pine Hill to all of its other customers less the special 20% discount (R. 95, p. 60; A. 164u, v and w). Accordingly, Pine Hill notified Frey that Pine Hill would supply Frey with aggregates for Frey's Pavement Road concrete plant on the basis of the 1968 list prices (A. 164cc-ff). Frey, on the other hand, demanded that the sales be made on the basis of the *1958* price list, less the 20% discount (R. 95, p. 60; A. 164wm 164gg; A. 1122). Frey thereupon elected to obtain its Pavement Road concrete plant requirements for aggregates from other sources in the area, including, to a limited extent, from plaintiffs' own Alexander resources and gravel plant (R. 90, pp. 129-30; A. 627, 675, 677, 679, 701, and references previously noted). Pine Hill commenced an action in the Supreme Court of New York to collect over $37,000 due from Frey for aggregates delivered after the January 31, 1968 price list was published and became effective on April 1, 1968.

Taking the position that the Pine Hill 1968 price list was not binding as a basis for charges to Frey because notice of the change in prices had been given on February 8, 1968 rather than on February 1, 1968 or before, the plaintiffs instituted this action for breach of contract in the District Court for Western New York in June 1970 (R. 95, p. 60; R. 94, p. 72).

On May 7, 1971, without prior written notice, and during the absence of the defendants' attorney, Charles McDonough, the plaintiffs obtained an order from the District Court requiring Pine Hill to sell aggregates to Frey for the Pavement Road concrete plant on the basis of the 1958 prices (A. 95; R. 89, Proceedings of May 7, 1971). On May 11, 1971, defendants' attorney McDonough,[5] obtained an order directing the

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[5] Mr. McDonough died in the Spring of 1974 (A. 604).

plaintiffs to show cause why the May 7, 1971 order should not be vacated or modified (A. 99). On June 9, 1971, the District Court entered another order providing, among other things, that Pine Hill would be required to satisfy Frey's Pavement Road concrete plant requirements for sand and gravel at Pine Hill's then-current prices as charged to its other customers, less the 20% special discount, and the 2% monthly payment discount (A. 178-81). The order also provided that if Frey elected to have Pine Hill provide trucking delivery service, Frey would pay a delivery charge of $.70 per ton into an escrow account pending further order of the Court (A. 180). Thereafter, Pine Hill made deliveries to Frey on the basis of that order, in accordance with Frey's demands (A. 1120-3).

In 1972, however, Frey discontinued purchasing grit (sand) from Pine Hill while, at the same time, continuing to demand that Pine Hill supply Frey with its requirements of gravel (A. 1124; A. 241-8; A. 275-81; A. 1178; A. 1234) In view of the fact that the production of gravel results in the coincident production of materials for grit, this tactic by Frey resulted in Pine Hill having surplus supplies of grit with consequent added expenses in stockpiling and the like (A. 279-81, A. 1151-60, 1186-7; A. 1251).

As a consequence of further increases in the costs of production, Pine Hill filed a motion on June 21, 1974 seeking modification of the order of June 9, 1971 to update the prices and delivery charges, and to give the Court an opportunity to review the propriety of continuance of any order requiring sales to Frey at discriminatory discount prices (A. 237). Pine Hill had discontinued operation of the Peppermint Road gravel pit and plant and, in order to comply with the Court's June 9, 1971 order, had been supplying Frey's Pavement Road plant gravel demands from a Pine Hill gravel plant on Genesee Street (A. 1233, line 22-1235, line 21; A. 17, ¶f).

After consideration of detailed affidavits and submission of testimony at the instance of the plaintiffs, the District Court ordered on November 20, 1974 that the order of June 9, 1971 be terminated (A. 352). In doing so, the Court noted that the essential purpose of the June 9, 1971 order was to bring about an early resolution of trial preparation (A. 352). As indicated, the June 9, 1971 order had the opposite effect, since, with its entry, the plaintiffs in substantial measure apparently achieved the motivating purpose of the litigation, and thereafter, "Plaintiff's attempts to obtain production and discovery were deferred [by plaintiffs] until the end of December, 1974" (Plaintiffs' Brief, p. 7).

On January 10, 1975, the defendants filed a motion for dismissal of the complaint under Rule 12, and for summary judgment under Rule 56 (A. 407). After numerous delays requested by plaintiffs, the motion was finally submitted to the District Court for determination on August 19, 1975 (A. 573, 575; A. 605). On November 10, 1975, the District Court filed its decision and judgment granting defendants' motion to dismiss the complaint for failure to state a claim under the federal antitrust statutes under Rule 12, and granting summary judgment pursuant to Rule 56 (A. 603).

Plaintiffs thereafter prosecuted this appeal in a most dilatory fashion, as detailed in Appendix I.

The Ready-Mixed Concrete Business

The Court is generally familiar with ready-mixed concrete and its uses. By its nature, it is a product geographically restricted in sale to limited local areas. Pine Hill and Frey have been in the ready-mixed concrete business for several decades in the Western New York area—making sales principally in Erie, Niagara and Genesee Counties (R. 90, p. 4; A.

182; A. 1175). No sales have ever been made outside of the State of New York (A. 409 at 411-19). Nor have any sales of product been made for incorporation into other products placed into interstate commerce (A. 409 at 416).

Ready-mixed concrete is comprised of water, coarse aggregates, fine aggregates and cement. The term aggregate is defined by the American Society for Testing Materials (ASTM) as follows (A. 543):

> "*Aggregate*—'The inert material, such as sand, gravel, shell, slag, or broken stone or combinations thereof, with which the cementing material is mixed to form a mortar or concrete.' "

Fine aggregate is defined by the ASTM and the New York State Department of Transportation (A. 542, 543):

> "FINE AGGREGATE
>
> " '*General Characteristics*. Fine aggregate shall consist of natural sand, manufactured sand, or a combination thereof.' "

Coarse aggregate is defined (A. 543):

> "COARSE AGGREGATE
>
> " '*General Characteristics*. Coarse aggregate shall consist of gravel, crushed stone, or crushed air-cooled blast furnace slag, or a combination thereof . . . .' "

The cement used is standard Portland-type cement (A. 543-4).

As a general proposition, the producer of ready-mixed concrete may select and use whatever coarse aggregate the producer desires, such as: crushed stone, slag, lightweight gravel, other similar materials, singly or in combination (A. 1110-1, 1118-9; A. 989; R. 90, pp. 129-30; A. 843-5; A. 866, lines 4-21). On occasion, the customer will identify the particular

coarse aggregate to be used in the mix, but as a general matter the various coarse aggregates are interchangeable and substitutable (A. 874, line 8—875, line 10).

Competition in the ready-mix concrete business in Western New York is acute (A. 712, 736, 778-9; A. 836, 840-3, 861-3; A. 918-24). For the past six years, it has been a "buyer's market" (A. 918-24). Plaintiffs testify that in production and sale of ready-mix, "Pine Hill and Frey would be almost at a par with one another" (A. 1105), that 'the two of us . . . would probably be equal in the amount of volume that we haul" (A. 1107), and that together, Frey and Pine Hill account for approximately 50% of the sales of ready-mix in the Western New York market (A. 1109-10). Accordingly Frey and Pine Hill each have about 25% of the ready-mix concrete business in the Western New York market.

There are and have been numerous other concerns actively engaged in the ready-mix business in direct and continuing competition with both Frey and Pine Hill; accounting for the remaining 50% of the market, some of which are:

Clarence Readi-Mix Concrete Corp. (A. 712, 836, 184)
Buffalo Gravel Corp. (A. 712, 736, 184)
Amherst Ready-Mixed Concrete Corp. (A. 184, R. 94, pp. 25-7)
Quality Concrete, Inc. (A. 184)
County Line Ready Mix (A. 184)
Buyers Concrete (A. 837)
Stone Concrete Mix Co., Inc. (A. 184; A. 837)
Bender Ready Mix (A. 712; A. 837; A. 184)
Riley Ready Mix Concrete Corp. (A. 840-3; A. 184)
Riefler Ready Mix (A. 840-3; A. 184)
Empire Builders Supply (A. 778; A. 184)
N. Y. Phennig Ready Mix (A. 184)
Schabell Concrete (A. 837; A. 184)
Robert Buyers Ready Mix (A. 184)
Niagara Concrete (A. 779; A. 840-3)
Town Line Concrete (A. 840)

Despite recurrent representations to the Court by plaintiffs that Frey is and has for years been, on the verge of financial destruction (A. 115, 304, 311) and has "lost" and is "losing" money in the concrete business (exclusive of profits from their Alexander gravel and sand business; A. 1047) to the tune, variously, of $150,000 or $200,000 per year, the *facts* are to the contrary:

1. Throughout the entire period both before and after the institution of this action, Frey has competed successfully against Pine Hill on a job-by-job basis for commercial work, which represents the major portion of all concrete sales (A. 861-3, 903; R. 9, p. 276).

2. Plaintiffs presented no verified financial data supportive of their counterfeit claims of financial distress. Indeed, Frey president, Herbert Frey, testified that he could not "recall" whether Frey had a profit or loss during any of the years 1968, 1969, 1970, 1971, 1972 or 1973 (A. 1048-50).

3. Flying in the face of the unsubstantiated claims of "losses" and inability to compete on a successful basis with Pine Hill and the numerous other ready-mix producers is the *fact* that since 1970 Frey has purchased 12 huge mixer trucks (eight 12-yard trucks at $51,000 each and four 10-yard trucks at $45,000 each) for a total new investment of $588,000 (A. 1012-7). To make this additional equipment investment of $588,000, Frey used some of its own funds and obtained local bank financing for the balance. Although plaintiffs did not disclose the details of these purchases and financing, it is reasonable to assume that the bank would not provide major financing to a corporation *in extremis* or to a corporation unable to demonstrate an ability to repay from current and future operations.

It is thus apparent that defendants have no monopoly in the ready-mix concrete business, have no potential of obtaining a

monopoly or monopoly power, have no ability to fix or control prices in the industry, have no ability to exclude others from entering the industry and no ability to force any competitor out of the industry, and that the competition in the industry is keen and effective in terms of quality of service and price to the purchasing public. Plaintiffs' real complaint is that Pine Hill refuses to engage in the anitcompetitive practice of giving Frey a discriminatory 20% price discount on sand and gravel which is not given to Pine Hill or to other competitors of Frey.

The Aggregate Business

Both Frey and Pine Hill have their own resources of aggregates in the market area (A. 625, 749, 961, 1175). As admitted by plaintiffs, all aggregate requirements for Frey's Pavement Road concrete plant could be obtained from plaintiffs' Alexander gravel plant—*if* plaintiffs elected to do so. Despite full and complete opportunity, plaintiffs have placed no evidence in the record to the effect that their own resources of aggregates could not be economically used for their concrete production. On the contrary, plaintiffs have, in fact, supplied their Union Road concrete plant with aggregates from their Alexander gravel plant (A. 677, 701, 960, 962) although the Union Road concrete plant is over six and one-half miles farther from Alexander than their Pavement Road concrete plant (A. 527).

Furthermore, Frey's president testified that Frey had done no analysis by cost accounting or otherwise to determine if Frey could produce concrete more cheaply by using plaintiffs' own aggregates (gravel or sand) from the Alexander resources than by obtaining those aggregates elsewhere (A. 1041-6). If this testimony is taken at face value, it affords the Court with dramatic proof that the plaintiffs have not taken even the most rudimentary steps to determine how to run their con-

crete business most profitably or to determine from information readily available to them if there is any substantive basis for the wild accusations made against defendants.

At least two other facts emerge very clearly:

1. That by reason of plaintiffs' own ownership or control of very substantial resources of gravel and sand, and of a washing plant for the production of those aggregates, defendants have no monopoly or near monopoly of gravel or sand in the area; and

2. For their own reasons—in order to maximize the profitability of their *aggregates* business—plaintiffs have *elected* not to provide their concrete plants with aggregates readily available from their own resources. Instead, plaintiffs attempt to fasten antitrust liability on defendants *on the ground that* Pine Hill will not sell gravel and sand to Frey at preferred, discriminatory prices 20% below those charged by Pine Hill to all of its other customers, including concrete concerns competing with Frey.

Moreover, Frey has, over the years, obtained its needs of gravel and sand from other suppliers in the area (A. 675, 679, 703, 773-6, 781, 836-45, 972-3, 1065-6, 1127-8), and Frey has been able to compete successfully in the concrete business by making sales based on the prices paid by it for gravel and sand, and based on each such sale of concrete including an allowance for profit (R. 91, p. 276; A. 860-3, 903, 1105, 1107; A. 784-6).

In addition, there are very substantial quantities of crushed stone in the immediate vicinity of Frey's concrete plants, and Frey has purchased large amounts of crushed stone for use as the coarse aggregate in its concrete production (R. 90, pp. 129-30; A. 845, 986, 989, 1111, 1118-9). The record shows that necessary aggregates for the manufacture of concrete are

readily available from numerous suppliers in the area: Frey Sand & Gravel, Inc.; Clarence Sand & Gravel; Dan Gernatt; Buffalo Gravel (Buffalo Slag Co.); Olean Sand & Gravel; Western New York Sand & Gravel; Erie Sand & Gravel; Lancaster Stone Products, Inc.; Buffalo Crushed Stone Co.; Federal Crushed Stone Co.; Niagara Stone Co.; County Line Stone Company, Inc.; Frontier Stone Products, Inc.; General Crushed Stone Co.; DeWitt Sand & Gravel Co.; Franklinville Sand & Gravel; Machias Sand & Gravel (A. 184, 186; A. 675, 677, 679, 703, 707, 773-5, 781, 836-45, 972-3, 1065-6, 1127-8).

Plaintiffs' own admissions totally rebut present claims of monopoly or monopoly power and of restraint of trade through price control or otherwise.

Plaintiffs' Selective Use of Price Discounts and Other "Gimmicks" to Compete Unfairly on a Discriminatory Basis.

Plaintiffs make a variety of nonfactual claims on brief that defendants have been involved in a number of improper practices which "restrained competition" (Brief, pp. 15, 19-G-i). These unfounded accusations are refuted *infra*, pp. 35-45).

What should be noted at the outset is that *plaintiffs* have been involved in the practices as to which they accuse defendants.

In initial testimony, Frey's president categorically denied that Frey had ever employed what he termed "gimmicks" to take ready-mix business from any competitor (A. 761-2). He defined "gimmicks" as follows: "Rebates, gimmicks or special reductions, discounts or considerations" (A. 760). He testified that Frey's concrete prices and terms to customers for various jobs were determined by Frey's sales manager, A. Douglas Burg and not by him (A. 767).

However, it later developed from the testimony of Frey's president, secretary and sales manager that prices and terms were, in fact, fixed by Frey's president, and Frey *regularly* employed "gimmicks" having no cost foundation. The "gimmicks" ranged from outright price reductions to foreclose competition (A. 782-3; A. 826-9), to the waiver of "waiting time" charges (A. 836), to the waiver of minimum trucking charges (A. 836), to the extension of the prompt payment discount period, and so on (A. 823-5; See *generally*, Burg: A. 800-23). It was ultimately developed that Frey's product "list price" has not been used in practice, that it is a fiction, and that prices for ready-mix are and have been set on a customer-by-customer and case-by-case basis, without cost analysis, without cost justification, and without the application of any standard objective criteria (A. 864-5; A. 907-24).

Having broadly and generally engaged in the very practices they criticize, and having failed to provide the court with any evidence that Pine Hill has involved itself in such practices, the plaintiffs' accusations of restraint of trade antitrust violation are obviously misplaced.

POINT I

The complaint states no cause of action under any federal antitrust statute and was properly dismissed under Rule 12.

Plaintiffs identify the first issue for review to be: "1. Did the complaint fail to state a claim under either the Sherman or Clayton Acts." (Brief, p. 1). Having thus acknowledged the threshold issue, plaintiffs promptly ignore the entire subject and attempt to sweep the question under the rug. Plaintiffs provide the Court with no analysis of the complaint to

demonstrate its alleged sufficiency and with no authority condoning their exclusive recitation of nonfactual accusatory conclusions.

Plaintiffs' conduct in this respect is understandable: The complaint is a fact not subject to change by misstatement, and plaintiffs have conceded its insufficiency (A. 1317, lines 5-7).

In dismissing the complaint under Rule 12, the District Court stated in part:

> "More important, a generous reading of the complaint may reveal a cause of action for breach of contract, but not a violation of the antitrust statutes. . . . The essence of the complaint is that defendant Pine Hill has allegedly refused to continue to sell gravel and concrete products to plaintiffs at a preferred discount price from the price charged by defendant Pine Hill to competitors of plaintiff." (A. 610).

A. Unrebutted Decisional Authority Mandates Dismissal of the Complaint.

The complaint makes hollow, conclusory allegations of violation by defendants of Sections 1 and 2 of the Sherman Act (Title 15 U.S.C. §§ 1 and 2) and of Sections 1 and 4 of the Clayton Act (Title 15 U.S.C. §§ 12 and 15) (paragraph 22, at A. 15).[6]

The District Court properly held that in order to state a cause of action for violation of the Sherman Act provisions, the plaintiff must plead ultimate *facts* establishing conspiracy, contract or combination in restraint of trade or commerce among the several states, or *facts* establishing

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[6] No allegations of violation of the Robinson-Patman Act, conclusory or otherwise, are made. Nevertheless, plaintiffs attempt to include such claims *on this appeal* (Plaintiffs' Brief, pp. 27, 31). The pertinent provisions of Sherman Act Sections 1 and 2 are set out in Appendix II.

monopolization or attempts to monopolize "any part of trade or commerce among the several States" (A. 603-13). It is not enough merely to plead either factual or legal *conclusions* of violation. It is well settled that so-called "notice pleading" has no place in antitrust proceedings, and that the plaintiff must fully and clearly plead the *facts* which are alleged to constitute the violations. *Sandidge v. Rogers*, 156 F. Supp. 286 (S.D. Ind. 1957); *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 913 (5th Cir. 1952).

The same principles apply to alleged violations of the Clayton Act. Section 1 of the Clayton Act—which the complaint alleges has been violated by defendants—defines the terms "Antitrust Laws," "commerce" and "person." (15 U.S.C. §12).

Section 4 of the Clayton Act—which the complaint alleges has been violated by defendants—provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15).

Plaintiffs do not specify any other provisions of the Clayton Act as to which violations are claimed.

The basic rule of pleading in antitrust actions has been recapitulated in *Sandidge v. Rogers (supra)*:

> "It is elementary that in order to state a cause of action under the Antitrust Laws notice pleading, or the pleading of conclusions is insufficient but that the elements of the action must be alleged clearly, concisely, and particularly and factually. [Citations omitted]."

* * *

> "The legal conclusions alleged in the amended complaint are no stronger than the ultimate facts alleged therein would support them." (156 F. Supp. at 290).

See also: Seligson v. Plum Tree, Inc., 350 F. Supp. 440 (D.C. Pa. 1972); *L. S. Good & Co. v. H. Daroff & Sons, Inc.*, 279 F. Supp. 925 (D.C. W. Va. 1968); *Davidson v. Kansas City Star Co.*, 202 F. Supp. 613 (D.C. Mo. 1962). *Broadcasters, Inc. v. Morristown Broadcasting Corp.*, 185 F. Supp. 641, at 643 (N.J. D.C., 1960).

The Fifth Circuit rejected allegations such as those in plaintiffs' complaint in *Crummer Company v. DuPont*, 223 F.2d 238, *rev'g*, 117 F. Supp. 870, *cert. denied*, 76 S. Ct. 85, 350 U.S. 848 (1955):

> "The district judge, acting upon the well recognized rule that in pleading a conspiracy in an action such as this, a general allegation of conspriacy without a statement of the facts constituting the conspiracy, its object and accomplishment, is but an allegation of a legal conclusion which is insufficient to constitute a cause of action, concluded that the facts alleged were insufficient to charge these appellees, or either of them, with a violation of the anti-trust laws.
>
> * * *
>
> "Charges as to such conspiracies must be based on substantial and affirmative allegations, and no mere gossamer web of conclusion or inference, as here, trifles light as air, to the suspicious strong as proofs from Holy Writ, will suffice, and we are in no doubt that the court did not err in dismissing Gall and Cummer Sons from the suit." 223 F.2d at 244-5.

Antitrust actions are complex, expensive, and judicially consuming. They present a rare opportunity for competitive oppression. Those accused with violations are entitled to a concise statement of the essential facts which, if proved,

without intervening defense, would require relief to be granted to the claimant. Each defendant has a right to know what actions on his part constitute participation in the alleged conspiracy. *U.S.* v. *E.I. Dupont DeNemours & Co.*, 13 F.R.D. 98 (M.D. Ill. 1952). No specification of facts have been provided here.

In antitrust cases there is a particular need to require factually explicit statements of claim—since an antitrust suit presents such special opportunity for harassment, imposition and possible abuse of discovery proceedings for competitive business reasons.

The complaint in this action is a case in point.

B. Plaintiffs' Complaint Recites a Nonfederal Breach of Contract Claim: No Antitrust Cause of Action is Stated.

1. A Brief Review of the Complaint

Plaintiffs purport to set forth the *facts* upon which the claims of violation of the federal antitrust statutes are based in paragraphs 22 through 30 of the complaint under the heading, "*THE WRONGFUL ACTIONS AND CONSPIRACY.*"

Paragraph 22 contains entirely conclusory allegations (A. 15). Paragraphs 23 and 24 assert queer and legally outlandish claims of "reverter" to plaintiffs of the Pavement Road gravel plant and property sold by George Frey to Pfohl Brothers, Inc. in 1949; the allegations are senseless (A. 15).

In paragraph 25, plaintiffs make the curious allegation that the ownership of the property described in paragraph 23, was evidenced by a deed to Pine Hill's subsidiary, Regent, which was not executed or recorded until on or about May 1,

1969 (A. 16). Aside from the obvious irrelevance of any such allegation (in view of plaintiffs' immediate knowledge of and concurrence in the transaction), and the absence of any basis upon which to premise a claim even assuming the truth of the allegation, the allegation is totally false.[7] Paragraphs 25 and 26 of the complaint lend nothing to the statement of a cause of action.

The allegations of *fact* presumably intended to support a cause of action for violation of the federal antitrust statutes appear in paragraph 27 of the complaint (A. 17-8), and are briefly summarized as follows:

a) That commencing on or about February 6, 1968 the *defendants dishonored the contract of May 17, 1949* (A. 148-58);

b) That defendants unilaterally raised the price of gravel to plaintiffs to a price in excess of that stipulated *in the 1949 contract* (that is, that Pine Hill sought to charge Frey the prices Pine Hill put into effect on April 1, 1968 and charged to all of its customers);

c) That *contrary to the 1949 contract* the defendants refused to allow Frey the discounts set forth in the contract;

d) That *contrary to the 1949 contract* the defendants refused to deliver gravel to Frey's plant without charge;

e) That *contrary to the 1949 contract* the defendants refused to sell gravel to Frey except at defendants' regular list prices pursuant to which it made sales to others in the area;

f) That *contrary to the 1949 contract* the defendants closed down the Peppermint Road gravel plant;

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[7] The deed to which reference is made was *executed* on August 31, 1957 (A. 465-7). It was not *recorded* until May 1, 1969, a fact which has nothing to do with any relationships between the plaintiffs and the defendants or any possible issues in this action (A. 466).

g) That *contrary to the 1949 contract* the defendants refused to sell or deliver gravel to Frey on credit;

h) That defendants recorded a deed executed August 31, 1957 to the Peppermint Road premises from Pfohl Brothers, Inc. to defendant Regent on February 11, 1969;

i) That defendants instituted an action in the Supreme Court of the County of Erie against Frey to recover amounts owing from Frey to Pine Hill for aggregate sales made;

j) That defendants continued to compete with the plaintiffs for customers and business in the area;

k) That defendants made attempts to purchase the plaintiffs' business for less than the value thereof;

l) That defendants "otherwise monopolized, restrained and injured the plaintiffs and their business."

It is clear that even if the truth of all of these allegations is assumed, there is no statement of a cause of action for violation of any of the federal antitrust statutes. What plaintiffs have alleged is a nonfederal cause of action for breach of contract.

2. No Cause of Action is Stated Under the Sherman Act.

As to alleged violations of the Sherman Act, the complaint is deficient in that:

—There is no statement of fact specifying the relevant interstate market as to which conclusory claims of monopolization or attempted monopoly allegedly relate.

—There is no statement of fact as to the proportion of the relevant market which it is claimed the defendants control.

—There is no statement of the facts which it is claimed support the conclusory allegations of conspiracy, contract, plan,

scheme, combination, agreement or arrangement on the part of the defendants; there are no allegations whatsoever specifying the claimed actions of each of the defendants in the alleged conspiracy, contract, plan, scheme, combination, agreement or arrangement.[8]

—There is no statement of fact in support of the wholly conclusory allegation that the defendants are guilty of an unlawful monopolization or restraint of trade and commerce in the "gravel and ready-mixed business": no statement of fact as to the nature of the interstate commerce allegedly affected; no statement of fact of the nature or extent, if any, of the interstate commerce in which it is claimed plaintiffs and defendants are engaged; no statement of fact of the extent to which it is claimed defendants' alleged conduct has effected a restraint on that interstate commerce; no statement of fact of the alleged factual consequences of the claimed improper conduct.[9]

—There is no statement of fact showing any actual or potential detriment to the public from the alleged attempt to

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[8] Pine Hill Concrete Mix Corp. was wholly owned by defendant Ludwig Kahle before his death on September 22, 1976; Regent Sand & Gravel, Inc. is a wholly owned subsidiary of Pine Hill (A. 182, 188). The individual Pfohl defendants have no relationship to the other defendants; defendant Pfohl Brothers, Inc. was dissolved in 1957 (A. 9, 195, 199).

[9] *See infra*, pp. 35-38, for plaintiff's admissions of plaintiffs' ownership of gravel and sand resources and plant, of plaintiffs' knowledge of available gravel lands in Erie County, of plaintiffs' ability to satisfy their needs for aggregates from other suppliers, and of the availability of aggregates other than gravel for use in the manufacture of ready-mixed concrete.

See infra, pp. 38-41, for plaintiffs' admissions that Frey and Pine Hill are equal in the amount of volume of concrete that they sell, that plaintiffs compete successfully with Pine Hill, and that there are and have been numerous other concerns actively and successfully competing in the concrete business in the area.

create a monopoly, or the claimed actual monopoly, or from the conclusorily stated claim of restraint of interstate commerce.

—There is no statement of fact to show that the defendants have extraordinary control of an appreciable part of interstate commerce.

—There are no facts pleaded from which any conclusion could be made that the defendants have attempted to obtain an extra-ordinary control of an appreciable part of interstate commerce, or that their alleged conduct could lead to such a result.

—No facts are alleged upon which the conclusion could rest that the defendants, whether singly or in concert, have engaged in or are engaging in conduct which constitutes an unreasonable restraint of trade in or affecting interstate commerce.

—There are no allegations of price control or manipulation by defendants of aggregates and/or concrete which affects or has affected interstate commerce to the detriment of the public.

—There are no allegations setting forth facts which, if proven, would establish that the alleged conduct of defendants has had an adverse effect on the price of concrete and/or gravel to the general public.[10]

—There are no factual allegations—either as to the broadly referred to "gravel business" or "ready-mixed business"—as to the quantities of these products involved in the claimed relevant market (which is itself not defined), the proportions

[10] On the contrary, the essence of the claims stated by plaintiffs is that defendant Pine Hill has allegedly refused to continue to sell gravel and concrete sand to Frey at a preferred, discriminatory discount price from the price charged by Pine Hill to competitors of Frey (paragraphs 19 and 27).

of those quantities as to which it is claimed defendants' conduct relates, or the proportions of the total interstate commerce concerning which it is alleged defendants have affected a monopoly or are attempting to do so.

—There are no factual—or, indeed, even conclusory—allegations of an attempt on defendants' part to effect a change, or of an actual change, in the flow of gravel or concrete in or affecting interstate commerce.

In sum, if the sparse ultimate facts pleaded by plaintiffs—as distinguished from the litany of conclusory legal accusations—were to be established by plaintiffs upon a trial, there would and could be no showing of any violation of the Sherman Act. What the complaint accuses is that defendants are competing with plaintiffs, and that defendants have dishonored a contract giving plaintiffs price treatment preferential to that of other customers of defendants.

3. No Cause of Action is Stated Under the Clayton Act.

The complaint does not specify the particular provisions of the Clayton Act which plaintiffs claim have been violated or any facts to state a cause of action:

—There are no allegations of fact that either the plaintiffs or defendants have at any time been involved in sales of either gravel or concrete across state lines, that is, *in interstate commerce,* or in sales of gravel or concrete which are incorporated into products sold *in interstate commerce.*

—There are no allegations—factual or conclusory—that any of defendants have discriminated in price to the detriment of plaintiffs or with the result of substantially lessening competition or tending to create a monopoly in violation of Section 13, Title 15. On the contrary, plaintiffs' essential complaint is that defendants allegedly refused to price dis-

criminate in their favor. There are no factual allegations in support of any claim of violation of Sections 13 a, b and c, 14 or 18.

In sum, if the spare allegations of fact in the complaint were proven, no violation of any section of the Clayton Act would be established.

C. The Complaint Alleges No Jurisdictional Facts.

Bare allegations that defendants have engaged in conduct effecting a restraint of interstate commerce or a violation of the federal antitrust statutes are not sufficient to support the jurisdiction of the Court or to save the complaint from dismissal. *See, e.g., Martin v. National League Baseball Club,* 174 F.2d 917 (2d Cir. 1949).

1. No Jurisdiction Under the Clayton Act.

To constitute a violation of the Clayton Act, the transactions complained of must (1) be *in* interstate commerce, and (2) they must substantially lessen interstate commerce. Facts must be pleaded to demonstrate that the parties are engaged in interstate commerce and that the *products* as to which the alleged illegal conduct relates eventually *actually flow* in interstate commerce. *See Standard Oil Company v. FTC,* 340 U.S. 231, 71 S. Ct. 240 (1951).

There are no allegations of fact that any of the parties to this action are or ever have been engaged in the business of buying, selling or dealing in gravel, sand or concrete in interstate commerce, and none that any of the parties has ever sold any of these products outside of Western New York. Instead, plaintiffs attempt to premise jurisdiction on generalized allegations that the gravel and concrete products find their way into local construction projects, such as highways, roadways,

airport landing strips and the like, which, it is again generally alleged, are part of or affect interstate commerce. If there were any questions concerning the sufficiency of such a showing as a basis for federal jurisdiction, those questions have recently been clearly and conclusively resolved in the Supreme Court's decision in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, *rev'g* 487 F.2d 202 (1974).

The Supreme Court summarized the issue in *Copp* as follows:

> "[1a] This case concerns the jurisdictional requirements of § 2(a) of the Robinson-Patman Act, 15 USC § 13, subd (a) [15 USCS § 13 subd (a)], and of §§ 3 and 7 of the Clayton Act, 15 USC §§ 14 and 18 [15 USCS §§ 14 and 18]. It presents the questions whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections, and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §§ 2(a) and 3 respectively. The Court of Appeals for the Ninth Circuit held these jurisdictional requirements satisfied, without more, by the fact that sales of asphaltic concrete are made for use in construction of interstate highways. 487 F.2d 202. We reverse." 419 U.S. at 186.

The *Copp* decision in and of itself compels dismissal of the complaint on jurisdictional grounds.

Another case directly in point is *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972), *aff'g* 330 F. Supp. 549. Summary judgment was there granted dismissing the complaint for the reason that activities of defendants were not in interstate commerce as contemplated by any of the federal antitrust statutes. Plaintiff and defendants were in the business of producing and selling concrete sand and gravel entirely within the State of Louisiana.

Rosemound resisted, arguing that the Court had jurisdiction since the parties made substantial purchases of tools, supplies and equipment from out-of-state for their operations, and that the alleged conspiracy related specifically and directly to the provision of sand and gravel for incorporation into concrete mattresses to be used in connection with construction work on the Mississippi River, an interstate instrumentality.

The District Court properly made short shrift of the claim of jurisdiction under the Clayton and Robinson-Patman Acts; and held further that the jurisdictional requirements of the Sherman Act had not been satisfied.

The Fifth Circuit Court of Appeals unanimously affirmed:

> "Finally, Rosemound insists that the district court erred in dismissing the complaint on the grounds that the defendants were not engaged in commerce and that their product did not flow in interstate commerce. Generally a plaintiff's allegations of jurisdiction are sufficient, but when they are questioned, as in this case, the burden is on the plaintiff to prove jurisdiction. [Citations omitted]. The complaint contains only the barest conclusory statements of jurisdiction and Rosemound has added little to shore up its initially weak position."

* * *

In the case at bar, plaintiffs' complaint "contains only the barest conclusory statements of jurisdiction". Furthermore, plaintiffs have added nothing of substance in their papers on defendants' motion "to shore up their weak position". *See also DeVoto v. Pacific Fidelity Life Ins. Co.*, 354 F.Supp. 874, 877 (N.D. Cal. 1973).

2. No Jurisdiction Under the Sherman Act.

To establish a violation of the Sherman Act, plaintiffs must allege and prove that the defendants committed the alleged

unlawful acts "in the flow of interstate commerce," that is, with respect to articles of commerce actually being sold across state or national boundaries, or that the acts, though done in local or intrastate trade "nevertheless had a *direct* and *substantial* effect on commerce." *LoCicero v. Humble Oil and Refining Co.*, 319 F. Supp. 1133, 1135 (E.D. La. 1970; emphasis supplied).

The Court will search the complaint in this case in vain for any factual nonconclusory allegations to the effect that either the business in question is itself interstate or that the acts complained of had or have a direct and substantial effect on interstate commerce. The complaint is replete with redundant conclusory allegations and accusations but devoid of any factual allegations the proof of which would support either a finding of jurisdiction or of liability.

The specific actions complained of are obviously local and intrastate in character. The business in question—the gravel and concrete business—is admitted to be necessarily local and intrastate.

As this Court has recently stated:

> " '[T]he test of jurisdiction [under the Sherman Act] is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.' " *Liberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964), quoting with approval from *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875.

The *Liberthal* dismissal of the complaint under Rule 12 is determinative here. The decision is of controlling importance because the *Liberthal* complaint—as distinguished from the Frey complaint—set forth detailed factual allegations upon which jurisdiction was claimed, all of which were summarized at length in the decision (332 F.2d, at pp. 270-1).

See also Black & Yates v. Mahogany Ass'n, 129 F. 227 (3d Cir. 1942).

The District Court properly held that the complaint here does not allege necessary jurisdictional facts.

POINT II

Summary Judgment: Justified and Necessary.

A. Plaintiffs Failed to Satisfy the Obligations Imposed by Rule 56(e).

In *Liberty Leasing Co. v. Hillsum Sales Corporation*, 380 F.2d 1013 (5th Cir. 1967), the Fifth Circuit affirmed a summary judgment against the defendant, observing:

> "However, Rule 56 requires that the opposing party be diligent in countering a motion for summary judgment, Southern Rambler Sales, Inc. v. American Motors Corp., 5 Cir. 1967, 375 F.2d 932, and mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment, Fed.R.Civ.P. 56(e), Robin Construction v. United States, 3 Cir., 1965, 345 F.2d 610, 613-614." (380 F.2d at 1015).

Noting that the defendant had in excess of two months to provide some evidentiary material in support of its position but failed to do so, the court held:

> "The contention of Liberty that the court was arbitrary and hasty is not persuasive in light of the fact that Liberty did nothing for over two and a half months to properly present '* * * a ground of defense fairly arguable and of a substantial character.' Robson v. American Cas. Co., 7 Cir. 1962, 304 F.2d 656." (380 F.2d at 1015-6).

In the case at bar, the plaintiffs had over eight (8) months to supply the Court with a proposed amended complaint and with some evidentiary support for the conclusory claims of

antitrust violation and injury. Plaintiffs did neither, despite the fact that the plaintiffs had over five (5) years from the commencement of the action to demonstrate a factual basis for the claims being made.

In *Billy Baxter, Inc. v. Coca Cola Company,* 431 F.2d 183 (2d Cir. 1970), this court affirmed summary judgment dismissing an antitrust complaint which contained sweeping allegations of violation of the Sherman, Clayton and Robinson-Patman Acts. The judgment below had also denied plaintiff's application to amend its complaint, finding that the proposed amendment did not result in the proper recitation of a claim under the federal antitrust statutes. After quoting Section 4 of the Clayton Act, the Court stated, at page 187:

> "The statutory requirement that treble damage suits be based on injuries which occur 'by reason of' antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 702, 82 S. Ct. 1404, 8 L.Ed.2d 777 (1962); Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed. 652 (1946); Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum.L.Rev. 570, 575-6 (1964). And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect."

The general and conclusory claims made by plaintiffs in their complaint and in papers filed with the Court are not sufficient to preclude summary judgment. Those claims have been specifically denied by the defendants, and defendants have provided the Court with evidentiary material in rebut-

tal. More significantly, plaintiffs' accusations, assumptions and speculations have been rebutted by *plaintiffs' own testimony.*

It is clear that it was up to the plaintiffs to produce *significant probative evidence* if summary judgment was to be avoided. It is a simple matter to draft a "boiler plate" anti-trust complaint and to institute an action. But, when a summary judgment motion has been made challenging the existence of any *facts* to support the accusations, the burden is on the plaintiff to set forth *specific facts* showing substance to the claims. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F.2d 389 (5th Cir. 1976). The plaintiffs here have not only not met that burden, they have admitted facts in their depositions which completely undermine their "glib and conclusory claims" (*Kemp Pontiac-Cadillac, Inc. v. Hartford Auto Dealers Assoc., Inc.*, 380 F. Supp. 1382 (D. Conn. 1974).

B. Plaintiffs Premise Their Arguments on Self-Contradicted and Spurious Claims

As detailed in defendants' motion dated November 12, 1976 to dismiss this appeal or to strike plaintiffs' brief for conscious failure to comply with Rule 28 of the Federal Rules of Appellate Procedure, plaintiffs' brief is replete with erroneous representations, extra-record assertions, and record references unsupportive of the statements for which they are cited. Those deficiencies will not be repeated in full here. We shall, however, demonstrate that plaintiffs' essential "factual" claims are counterfeit or fictional.

1. *Plaintiffs' Claim:* Defendants monopolized the grit market (Brief, p. 23).

The Fact: This is a false assertion, not alleged in the complaint, wholly unsupported by the record, and contradicted by plaintiffs' own testimony and actions.

No record support is cited by plaintiffs for this extraordinary fabrication. There is none.

On the contrary:[11]

—Plaintiffs have had their own substantial resources of grit since 1957 and have supplied their concrete plants from those resources (A. 625-7, 683, 701, 707, 960, 972; R. 96, p. 82).

—Plaintiffs have, at their own election, purchased all of their Pavement Road concrete plant needs for grit from other suppliers since 1972, and have purchased all of their grit requirements for their Union Road concrete plant from other suppliers since the inception of the plant in 1961 (A. 674-5, 679, 703, 773-5, 972-3; R. 96, pp. 81-2).

—Plaintiffs have been able to obtain all of their grit needs from others at prices "cheaper" than those which Pine Hill charges to all of its customers and, indeed, at prices "cheaper" than Pine Hill's prices even after the 20% discriminatory discount demanded by plaintiffs (A. 709, 776; R. 96, pp. 81-2).

—Pine Hill has at all times been willing to sell plaintiffs such grit as plaintiffs desire at the same prices and on the same terms and conditions as Pine Hill sells to its more than 100 customers (A. 164 cc, 164 ee, 1210; R. 96, pp. 81-2).

—Plaintiffs have owned, have traded in, and have had opportunities to purchase grit properties (A. 643, 651-2, 653, 655, 668, 746-7, 754-5, 997; R. 92, pp. 351-83. *See also* affidavit of Norman M. Moran, A. 540-4).

2. *Plaintiffs' Claim:* Defendants have a 100% monopoly of the gravel market (Brief, pp. 12, 18, 23, 25, 27).

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[11] Except as specifically noted, the record references in this section B 1 are to testimony of *plaintiffs*.

The Fact: This claim, which is a cornerstone of plaintiffs' position on this appeal, is a patent absurdity, contradicted by plaintiffs' own testimony and actions.

We refer the Court to the following record *facts:*[12]

—Frey president, Herbert Frey, testified in 1973 that he knows of gravel lands within Erie County. He refused to disclose their location for the reason that: "Well, some day there may be a reason that I just may want to get them myself" (A. 668).

—Frey's officers and owners further conceded that they have owned gravel lands, some of which they elected to sell (A. 651-3, 746-7, 754-5, 984-5, 994-5, 997; R. 92, pp. 351-83).

—Herbert Frey has admitted that the plaintiffs had many offers of opportunities to buy gravel lands which they have not acted on (A. 643-6, 648, 653).

—Plaintiffs have conceded that they have been able to get their needs of both grit and gravel from suppliers other than Pine Hill (A. 1128, lines 3-13).

—Plaintiffs operate a concrete plant on Union Road in West Seneca, New York, which services the market area to which plaintiffs' claims relate. Plaintiffs have admitted that Frey has had no trouble in getting sand or gravel to operate this plant, and, in fact, Frey's president characterized those wishing to sell gravel and sand to Frey as being "pushy" (A. 703).

—Plaintiffs have obtained substantial quantities of gravel and sand for their Union Road plant from their 500-acre gravel and sand property and plant in Alexander (A. 677, 700-1, 749, 960, 972; R. 96, p. 82).

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[12] Except as specifically noted, the record references in this section B 2 are to testimony of *plaintiffs*.

—Plaintiffs' Pavement Road concrete plant is 24.1 miles from plaintiffs' gravel and sand resources in Alexander; plaintiffs' Union Road concrete plant is 30.8 miles from the Alexander resources. Plaintiffs could, if they would completely supply the Pavement Road plant from their own Alexander resources (Affidavit of V. T. Fuzak, A. 527; A. 707).

—Plaintiffs have available to them substantial resources and supplies of both gravel and grit in the market area to which the claims relate, but plaintiffs would prefer to attempt to acquire Pine Hill to supply plaintiffs' needs of gravel for their Pavement Road plant in order to conserve their own sources and supplies for sale to others (A. 1026-7; 1038-9; 1041-2; 1045-6).

—There are 1,058 square miles in Erie County, and there are 532 square miles in Niagara County. The unrebutted evidence establishes that there are substantial gravel and grit resources in the immediate area of plaintiffs' Pavement Road concrete plant (Affidavit of Norman Moran, A. 540-2).

—Other aggregates for use in the production of ready-mixed concrete, fully substitutable for gravel, such as slag and crushed stone,[13] are readily and economically available and are being used and have been used by plaintiffs (A. 845, 986, 989, 1111, 1118, 1119; R. 90, pp. 129-30).

3. *Plaintiffs' Claim:* Defendants have made "major" acquisitions of companies resulting in the claimed

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[13] Gravel and crushed stone are qualitatively identical. Gravel is stone which is obtained from deposits in the soil which are excavated, processed, washed, screened and sized to different grades. Crushed stone is stone which is obtained from stone quarries and crushed and graded to size.

monopolization of the gravel and ready-mixed concrete markets (Brief, pp. 18-9).[14]

The Fact: There is nothing in the record to support the allegation that the acquisitions were "major" acquisitions. On the contrary, plaintiffs have admitted that Pine Hill and Frey are "equal in the amount of volume" of ready-mixed concrete they sell (A. 1105, 1107), and the record is clear that defendants have no disproportionate market power in the gravel business.

4. *Plaintiffs' Claim:* Defendants "fixed" their gravel prices at an unreasonably high level" (Brief, pp. 13-8, 24).

The Fact: There is no proof in the record to support this false statement. Plaintiffs' allegations in this respect relate to the period of time *after* the commencement of this action, when Pine Hill's sales of gravel to Frey were under the direct supervision and order of the District Court. On page 15 of their brief, plaintiffs complain that in 1968 Pine Hill did not raise its gravel prices enough, that the increase in gravel and in grit prices—the first in 10 years—should have been in the same proportion. No proof was offered to support this conclusion. Moreover, plaintiffs then complain that the price increases put into effect *in 1974*—as permitted by the District Court—were somehow improper because there was no increase in grit prices while gravel prices were increased by $.50 per ton. Again, plaintiffs provide no proof to support the bare allegation that this increase in gravel price during the

[14] Plaintiffs' extended quotation from the FTC "Enforcement Policy with Respect to Vertical Mergers in the Cement Industry" at pp. 29-31 of their brief may be misleading without the *caveat* that the entire statement of policy, and the plaintiffs' selected portion, relate to acquisitions by cement producers of ready-mixed concrete producers. That type of clearly interstate vertical integration is in no way involved in this case, and the comments concerning such integration are inapposite.

course of this proceeding was not cost justified. On the contrary, testimony and affidavits provided to the District Court conclusively established the cost justification for the increases (A. 836; A. 1185-8; A. 237-48, 275-85, 368-9, 353-4). The District Court found that there was cost justification for the increases (A. 352 at 353). Moreover, Frey has elected, and has been able, to supply its needs for gravel by purchases from other suppliers and from obtaining some materials from its own aggregate resources and plant. In addition, Pine Hill has at least 100 customers for grit and gravel who obviously do not find Pine [illegible]'s prices to be excessive inasmuch as they purchase those materials from Pine Hill in preference to other suppliers and sources (A. 1210, lines 2-5).

5. *Plaintiffs' Claim:* Defendants fixed their ready-mixed concrete prices "at an unreasonably low level" (Brief, pp. 13-8, 24).

The Fact: There is no proof in the record for this allegation. Plaintiffs concede that Frey and Pine Hill are virtually "on a par with each other" in sales of concrete, having approximately equal sales (A. 1105-7). This condition prevails as Frey and Pine Hill are in competition with each other and with other suppliers of concrete. Plaintiffs have conceded that Frey has competed successfully with Pine Hill over the years (A. 723-7, 860-3, 903, 918-24; R. 91, p. 276), bidding for jobs and getting jobs with the plan and the expectation of making a profit on each sale made (A. 784-5). Plaintiffs accordingly admit that they are in a position to compete effectively with other suppliers of ready-mixed concrete in the market area, including Pine Hill. Their present claims that Pine Hill has been selling concrete at unreasonably low prices are factually insubstantial. Plaintiffs acknowledge that Pine Hill has different costs, conceding that Pine Hill's labor costs are higher than Frey's because Pine Hill operates under a union contract (A. 836).

Frey's success in competing with Pine Hill totally rebuts the unsupported claim that Pine Hill has been charging an "unreasonably low" price for concrete. That success has been dramatically manifested in Frey's 1970 investment of $588,000 in 12 new mixer trucks (A. 1012-7). An investment of that magnitude in operating equipment presumably would not be made unless a determination were concurrently made that Frey could effectively compete in the concrete market in order to provide a return and profit on that major investment in new equipment. It is also significant that this very large investment was made *before* the District Court's order of June 9, 1971 requiring Pine Hill to supply Frey's needs of gravel and grit at the discriminatory discount prices and was made at a time when Frey was obtaining all of its needs for gravel and grit from suppliers and sources other than Pine Hill.

6. *Plaintiffs' Claim:* Defendants "tied-in" sales or gifts of "fill" to ready-mix sales, and defendants "tied-in" gravel sales to grit sales (Brief, pp. 19-20, 25).[15]

The Fact: a) There is no proof in the record and no facts in substantiation of the claims of "tying in" sales or gifts of "fill" to sales of ready-mixed concrete. The "record references" given by plaintiffs (Brief, p. 19) are entirely sterile. Once again, the rhetoric of antitrust is used, but there is no substantiation in the record.

b) The claim that defendants "tied-in" gravel sales to grit sales reaches the depths of irresponsibility. The plaintiffs' record support for this extraordinary assertion consists of portions of affidavits filed by officials of Pine Hill in support of Pine Hill's 1974 motion to amend the District Court's order

[15] See the affirmance of summary judgment in *Capital Temporaries, Inc. of Hartford* v. *Olsten Corp.*, 365 F.Supp. 888 (D. Conn. 1973), aff'd. 506 F.2d. 658 (2nd Cir. 1974).

of June 9, 1971 (A. 178) by increasing prices to Frey to reflect Pine Hill's increases in costs over the previous three years (A. 369, P. 6; 280, P. 9).

In obtaining the June 9, 1971 order, plaintiffs argued that during the pendency of the action Pine Hill should be required to perform Frey's 1949 Agreement with Pfohl Brothers, Inc. by providing Frey's requirements for *both* grit and gravel for its Pavement Road ready-mix plant at prices 20% below those charged by Pine Hill to its other customers for grit and gravel (R. 89). The 1949 Agreement explicitly required Frey to purchase all of its Pavement Road plant requirements of *both* grit and gravel from Pfohl Brothers, Inc. and, correspondingly, required Pfohl Brothers, Inc. to fill those needs for *both* products at the special, discriminatory 20% discount price (A. 148 at 154-5; A. 207-8.).

Having obtained that order, Frey forced Pine Hill to sell Frey both grit and gravel at the discount prices until 1972 when, contrary to the 1949 Agreement plaintiffs were relying on, and contrary to the June 9, 1971 order, Frey discontinued buying grit from Pine Hill because Frey could get its grit needs more cheaply from other suppliers (A. 1126, 1178, 776; R. 96, pp. 81-2). At the same time, however, Frey demanded that Pine Hill continue to supply it with gravel at the discount prices (A. 1235, 1242-3, 1251-2). The result was that Pine Hill accumulated large surpluses of grit in producing the gravel demanded by Frey.

On Pine Hill's 1974 motion for an updating of the prices contained in the June 9, 1971 order, Pine Hill advised the Court of these facts and argued that Frey should not be allowed "to have its cake and eat it too"—that if the Court were to continue the order requiring Pine Hill to sell Frey pursuant to the 1949 Agreement, that Frey be required to purchase both grit and gravel as that Agreement provided (A.

275-81). This is the "tie-in" which plaintiffs tell this Court is an antitrust violation by defendants! The District Court decided to terminate the order of June 9, 1971 for the reason, among others, that: "Furthermore, it was revealed at the hearing that the plaintiffs refused to purchase their sand [grit] requirements from defendants while insisting that defendants continued to supply them with gravel. According to defendants, this caused an accummulation of sand with adverse financial consequences" (A. 352 at 354).

Pine Hill has never refused to sell either grit or gravel on an entirely independent basis to Frey at the same prices it charges for those materials to all of its other customers (A. 164ee, 244-7).

The plaintiffs' attempt to twist and distort these facts into an illegal "tie-in" scheme by defendants is reflective of the unfortunate lengths to which plaintiffs will go to manufacture some basis for continuing this spurious suit.

7. *Plaintiffs' Claim:* Defendants "refused to deal" with Frey by refusing "to allow defendant Regent to sell grit and gravel to plaintiff on the same terms and conditions that Regent sold grit and gravel to its parent corporation, defendant Pine Hill" (Brief, pp. 25, 20).[16]

The Fact: This is a totally false statement, unsupported in the record, and completely rebutted by the record. The record support cited by plaintiffs to substantiate this claim (Brief, p. 20: R. 50, p. 14) is an unverified statement by plaintiffs' counsel as to proposed modifications to the June 9, 1971 order! On the other hand, the evidence in the record establishes that Pine Hill has, in fact, dealt with and supplied

[16] As to "refusal to deal" cases, see: *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F2d 867 (2nd Cir. 1962); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F2d 1093 (3rd Cir. 1972).

Frey with such aggregates as Frey desired to purchase (A. 275-81, 368-9, 691, 697). In testimony presented to the District Court by plaintiffs, it was established that for accounting and other purposes, Pine Hill treats itself as a customer in purchases of grit and gravel from its subsidiary, Regent, and that Pine Hill was charged the same prices for grit and gravel as were charged to Frey (except that Frey got the discriminatory 20% discount, and Pine Hill did not) (A. 1214-20). There has never been a refusal by defendants to sell grit and gravel to Frey at the same prices, and on the same terms and conditions, as Pine Hill obtains those materials from Regent. However, Frey has refused to purchase materials on that basis, demanding instead continuance of the expired and legally indefensible discriminatory discount.

8. *Plaintiffs' Claim:* Defendants have engaged in a variety of miscellaneous restraints, including: a) "customer rebates, discounts, free waiting time, transportation advantages" (Brief, p. 19), and b) "using information from pretrial discovery of plaintiffs' records to defendants' competitive advantage" (Brief, p. 20).

The Fact: a) These allegations are also false and wholly unsupported by the record. The references to the record cited by plaintiffs are to unsubstantiated conclusory accusations without factual support by an owner and officer of Frey (Muck: A. 264, 590), to nonfactual statements by plaintiffs' counsel (A. 321, 398), to testimony disclosing *plaintiffs'* involvement in such activities (A. 830, 825), and to a legal brief filed by plaintiffs' counsel (R. 84, p. 14). As admitted by plaintiffs, the plaintiffs are the ones who have engaged in such practices (A. 435-6, 760-9, 782-3, 800-29, 864-5, 907-24).

b) There is, similarly, no record support for the prejudicial and improper statement that defendants have used pretrial information to defendants' competitive advantage.

The assertion further exemplifies plaintiffs' reckless disdain of the record and of proper conduct on this appeal.

C. The Wall Concrete "Red Herring".

Plaintiffs attempt to equate sales of "wall concrete" with sales of ready-mixed concrete in general, and to leave the misimpression that the much talked of Pine Hill price of $22.00 per yard applies to sales of all ready-mixed concrete.[17] In fact, sales of "wall concrete" represent a small part of total ready-mix sales, the major business of Frey and Pine Hill being in "commercial" ready-mixed concrete (A. 876; A. 1024, lines—1026, line 6; A. 253, ¶'s 11 and 12). And, by their own admission, plaintiffs have effectively and successfully competed with Pine Hill and other ready-mix producers, keeping "on a par" with Pine Hill and selling "an equal volume".

In addition, plaintiffs' repeated allegations that Pine Hill's wall concrete price of $22.00 per yard was "below cost" are wholly unsupported by anything in the record. On the other hand, Frey's president was unable to testify as to how Frey arrived at its $23.70 price (A. 1024) and could not testify if Frey was, in fact, losing money on sales of wall concrete at $23.70:

> "Q. Do you know whether or not you had been losing money on wall concrete as a result of some analysis that's been done or some study of your operations that's been done?
>
> "A. I couldn't be exact to give you an answer of that type.
>
> "Q. Has any study been done to your knowledge of your company's operations to determine whether or not you have been losing money on wall concrete business?

[17] On page 10 of their brief, plaintiffs talk of the wall concrete prices as if those prices applied to all of Pine Hill's "sales of ready-mixed concrete." *See also* pp. 14-5, 24.

"A. On that particular item, I don't believe so. No particular item, sir." (A. 1025, line 19-1026, line 6)

The wall concrete story is a misleading "red herring."

D. Plaintiffs Have Failed to Provide Any Factual Substantiation for Their Claims of Damages and None Indicating Any Causal Relationship to Any Conduct of Defendants.

1. The Statutes and Cases Require an Evidentiary Showing of Injury and Causation.[18]

It is an elemental requirement that a plaintiff be able to establish the fact of injury and be able to provide evidence that the injury resulted from defendant's improper conduct. This responsibility is particularly pressing in civil, treble damage antitrust suits. *See Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (C.A. Ga. 1973), *cert. denied*, 412 U.S. 923; *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417 (C.A. Tex. 1975); *Smith v. Denny's Restaurants, Inc.*, 62 F.R.D. 459 (D.C. Cal. 1974); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, *modified*, 401 F. Supp. 1374 (D.C. Cal. 1974).

Section 4 of the Clayton Act explicitly requires that the injury to business or property be "by reason of" violation of the antitrust laws. Evidence of the occurrence or existence of injury and damage is, of course, peculiarly within the possession and knowledge of the claimant. A plain-

[18] The cases and authorities cited in Points I, II and III of plaintiffs' brief will not be discussed, since the record contains no facts to support the various claims of violation. Plaintiffs have simply used the "labels" and the "verbiage" of antitrust, without factual substance. Repetition of catch words such as "monopolization," "restraint of trade," "price fixing," "refusals to deal," "rebates," "tie-in sales," and the like, cannot create violations which do not exist.

tiff claiming injury to his property or business can—if such injury exists—factually demonstrate that injury by reference to his own books, records and witnesses. Discovery of the defendant is in no sense necessary to the demonstration of injury to the plaintiff. The same is true with respect to the production of evidence indicating causal relationship between the injury and the claimed violation. Accordingly, the plaintiffs' overdrawn and disingenuous protestations of inability to obtain discovery provide no excuse for plaintiffs' complete failure and inability to supply the Court with *any evidence* of injury or of causal relation.

This Court has but recently reiterated this requirement in *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., Inc.*, 510 F.2d 1140 (2d Cir. 1975), *cert. denied*, 95 S. Ct. 2416:

> "Failure to prove that it was injured 'by reason of' the defendant's alleged antitrust violations is of course sufficient to defeat Hudson Valley's claims. Clayton Act §4, 15 U.S.C. §15 (1970); see Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 . . . (1971)." 510 F.2d at 1142.

This Court reemphasized the antitrust plaintiff's burden to show injury and causal connection to the alleged violations in *Bowen v. New York News, Inc.*, 522 F.2d 1242 at 1255 (2d Cir. 1975).

It is also clear that on a motion by defendant for summary judgment, plaintiff must, under Rule 56(e), provide evidentiary support—as distinguished from unsupported claims—for the alleged injury and the claim of causation. *See Billy Baxter, Inc. v. Coca Cola Company (supra,* 431 F.2d at 187).

2. No Damages; No Causal Connection.

The record contains no evidence in support of plaintiffs' conclusory claims of injury, and none causally connecting the unsubstantiated damage with any alleged illegal conduct of defendants. Despite the complaint allegation of damages of "not less than $250,000," and repeated assertions of operating at annual losses, plaintiffs presented *no* verified financial information to support any of the conclusory assertions.

On the contrary:

—Plaintiffs were *unable* to identify the claimed elements of damages, either qualitatively or quantitatively, and plaintiffs' counsel repeatedly obstructed defendants' efforts to examine into these claims (R. 96, pp. 35-45, 54-60; A. 885-900; A. 964).

—Frey's president was unable to name even one customer lost by reason of defendants' alleged conduct (R. 96, pp. 54-60).

—Frey's president was unable to testify as to whether Frey operated at a profit or loss during any of the years 1969 through 1973 inclusive (A. 1047).

—Plaintiffs were unable to testify whether they were making or losing money on the sale by Frey of any of its products; no cost or other analysis had even been done (A. 1024-6, 1033-5, 1038-40; A. 800-804, 910-14).

—There has been no showing that the phantom losses were in any way caused by any conduct of defendants, as opposed to plaintiffs' own inefficiency and inadequacy of management.

3. Some Manifestations of Plaintiffs' Real Problem: Mismanagement and Ineptitude.

If plaintiffs have, in fact, suffered losses, it appears that the causes of those losses are the plaintiffs' own inefficiencies and ineptitude, or other phenomena unrelated to defendants:

—Plaintiffs do not know whether Frey is making or losing money on sales of its various products; no cost study or analysis has been done to determine individual product costs or profitability (A. 1026).

—Plaintiffs apparently set prices for Frey's products without employing even the most elemental business principles and techniques; Frey's president could not testify, for example, how the Frey wall concrete price was determined, or whether it would recover all costs of production (A. 1024).

—On commercial concrete sales, price discounts were allowed on a hit-or-miss basis, with no discount schedule being established on the basis of quantity or delivery distance cost differences; no cost analysis was performed, and no formula was established to assure that price discounts granted were cost based or justified (A. 800-4, 910-4).

—Plaintiffs passed up opportunities for the purchase of sand and gravel lands, and plaintiffs actually sold aggregates properties, thus voluntarily putting themselves in the position about which they complain (A. 653, 655, 668, 754-5, 994-7).

—In operating their gravel and sand resources and plant, plaintiffs have done no cost analysis to determine the cost of producing a ton of gravel or of sand; Frey Sand and Gravel, Inc. president, Herbert Frey, was unable to testify how its prices were determined (R. 90, p. 119; A. 1026-7; A. 1033-35).

—Without benefit of any cost analysis, plaintiffs have elected *not* to obtain aggregates for Frey from their Alexander plant,

in order to reserve the production of that plant for sales to others (A. 1026-42). Brief excerpts from the testimony of Frey's president on this subject are set forth in Appendix III.

—Plaintiffs' Alexander gravel and sand operation was shut down for over a year and a half obviously causing disruption in plaintiffs' operations (A. 742).

—Plaintiffs have been totaly unable to provide any facts to indicate damage to them or causation by defendants.

It is not the purpose or function of the antitrust statutes to require competitors or the public to support or subsidize inefficient, uninformed and inept management. Yet, that is the result plaintiffs' seek by this suit.

CONCLUSION

The Order and Judgment Below Should be Affirmed With Full Costs to Defendants.

The District Court properly dismissed the complaint under Rule 12 and under Rule 56. The order and judgment merit affirmance, with full costs to defendants.

Before closing, brief comment should be made on the singular suggestion by plaintiffs' counsel that if remand be granted, this Court assign the case to a different District Judge, or a different District, or to a Master "for a fresh approach. We submit that this extraordinary suggestion is unsupportable and immodest.

No application was ever made by plaintiffs for District Judge Curtin to recuse himself from consideration of this case. There have never been any grounds for such an application. There are none now. The record fairly shouts out

that Judge Curtin made every effort to give defendants every opportunity to correct their admittedly deficient complaint and to supply some evidentiary basis for their conclusory claims of antitrust violation and injury. Plaintiffs' failure to take advantage of those opportunities can hardly be used as a basis for plaintiffs' present attack on the District Judge. The suggestion that this Court, if it should remand, should assign the case to a different judge is a groundless affront.

Dated: Buffalo, New York,
December 30, 1976.

Respectfully submitted,

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APPENDIX I

Plaintiffs' Dilatory Appeal

Plaintiffs filed a Notice of Appeal from the order of November 10, 1975 on December 8, 1975. On December 29, 1975 this Court filed a scheduling order requiring plaintiffs to file the record on appeal on or before January 16, 1976 and to file their brief and appendix on or before February 26, 1976.

The record on appeal was filed on January 15, 1976, thus requiring plaintiffs to file their Rule 30 statement of joint appendix and of issues by January 25, 1976. Plaintiffs failed to file the Rule 30 statement by January 25. That statement was not filed until May 20, 1976, approximately four months after it was due.

Plaintiffs also failed to file their brief and appendix on or before February 26, 1976. Instead, on April 2, 1976, plaintiffs filed a motion requesting after-the-fact amendment of the scheduling order to permit plaintiffs to file their brief and appendix on or before May 31, 1976. In response to this motion, this Court entered a second scheduling order on April 16, 1976 granting plaintiffs' request and requiring plaintiffs to file their brief and appendix on or before May 28, 1976. A preargument conference was held with the Court's Staff Counsel on May 21, 1976.

Plaintiffs failed to file their brief and appendix by May 28, 1976 as required. An order of dismissal of the appeal was, therefore, entered on June 11, 1976.

On June 17, 1976, plaintiffs filed a motion to reinstate the appeal. After consideration of extensive affidavits, plaintiffs' motion was denied on June 29, 1976. By papers dated July 27, 1976, plaintiffs filed a motion for reconsideration of the June 29, 1976 order dismissing the appeal. Once again, extensive affidavits were filed. On August 24, 1976, an order was entered reinstating the appeal, subject to stated conditions.

APPENDIX II

Sherman Act, 15 U.S.C. Sections 1 and 2.

Section 1 of the Sherman Act provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." (15 U.S.C. § 1).

Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (15 U.S.C. § 2).

APPENDIX III

Excerpts From the Testimony of Herbert Frey.

"Q. Mr. Frey, has either the Plaintiff corporation or Frey Sand & Gravel, Inc., done any analysis, cost analysis to determine what the actual cost of a delivered ton of number one gravel would be to your Peppermint Road Plant, from your washer plant in Alexander?

"A. I fail to follow what you are trying to get at.

"Q. What I'm asking about is, whether or not any kind of a computation has been made to your knowledge, let's take it first from the Plaintiff corporation's standpoint, as to the actual cost of a delivered ton of number one gravel from Frey Sand & Gravel at Alexander, to your Peppermint Road Plant in Lancaster?

"A. I don't think we particularly run a particular analysis on it. We have looked into it, but you got to keep in mind too, if we remove the number one gravel from

our Alexander Plant, we are going to curtail sales of other products in that area.

"Q. I'm sorry, what do you mean by that?

"A. We have a very good market in that area, for sand and gravel operation.

"Q. That's Frey Sand & Gravel, Inc.?

"A. That's right, yes. Without using it in Frey Ready-Mixed Concrete. We start pulling some of the prime products out of there, we will obviously affect our other sales, or suspect we would affect them." (A. 1026, line 7—1027, line 10).

* * *

"Q. Sure, I'll try to rephrase that. Did you ever make any kind of an analysis to determine whether it would be cheaper for you, Plaintiff corporation, to obtain number one gravel from Frey Sand & Gravel Corp. in Alexander, and truck it to your Peppermint Road Plant, than it would be to obtain it from other sources in the Buffalo area?

"A. I believe we did, but in so doing, we had to keep in mind that we would be affecting other products in that same plant and also we had—in other words, we are affecting the retail of other products besides just the number one stone from this plant.

"Q. How do you mean? Why?

"A. Well, if we sold all the pea gravel—

"Q. Pea gravel is—

"A. Number one stone. If we sold all the number one stone, we would be depriving the local area out there of number one stone.

"Q. And, would that have an affect on your ability to sell some of the other products out there like number two or concrete sand?

"A. I would—I believe it would.

"Q. In other words, is it in your experience, do customers for example from Frey Sand & Gravel Corp. want to buy not only number one gravel from you, but also concrete sand and if they can't get both, they're liable to go somewhere else?

"A. No, it's not a case of liable to go some place else, they might be—come back and still get it, but they expect to buy all their needs, not just part of their needs from the one source.

"Q. I see. Now, in the analysis or study that you did as to the cost of bringing for example number one sand—number one gravel, I'm sorry, from Alexander to the Pepperment Road Plant, what did you find? Did you find that it would be cheaper, more expensive than or the same cost as you could get by buying it locally in the Buffalo area?

"A. I don't remember at the time I done it.

"Q. Do you have any—did you put that down on paper, does anyone have that down on paper anywhere what those costs were and what the comparison might be?

"A. I don't believe so." (A. 1038, line 9—1040, line 7)

* * *

"Q. Now, did you do an analysis to find out what it would cost you to provide the Plaintiff corporation with concrete sand from Alexander to the Peppermint Road Plant, based on the actual cost of production to Frey Sand & Gravel Corp. of this concrete sand, rather than the list price?

"A. No. I think what you are aiming at, can we produce it a lot cheaper if we were possibly consuming our own products, not selling to somebody else. I don't believe we done anything like that." (A. 1041, line 19—1042, line 5)

* * *

"Q. Mr. Frey, at any time to your knowledge has the Plaintiff corporation made any kind of a cost analysis to determine what the actual cost of obtaining number two gravel from your Alexander Plant would be, to the Peppermint Road Plant?

"A. No, other than looking at the—the apparent list price and leaving it go at that.

"Q. All right. Would your answer be the same if I asked it to you—the question, with respect to the concrete sand, the grit?

"A. Yes." (A. 1046, lines 12-22)

AFFIDAVIT OF SERVICE BY MAIL

RE: Frey Ready Mixed Concrete Inc.
vs
Pine Hill Concrete Mix Corp. et al

No. 75-7698

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 30th day of December, 19 76 I mailed _____ copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Raichle, Banning, Weiss & Halpern
Att: Arnold Weiss, Esq.
10 Lafayette Square
Buffalo, New York 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Hodgson, Russ, Andrews, Woods & Goodyear, Att: Victor T. Fuzak, Esq.
1800 One M & T Plaza, Buffalo, New York 14203

Leslie R Johnson

Sworn to before me this
30th day of December, 19 76

Patricia A Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77